BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Tampa Electric Company's Petition for an Increase in Base Rates and Miscellaneous Service Charges /	Docket No. 080317-EI Filed: May 15, 2009

INTERVENERS' MOTION FOR RECONSIDERATION

Pursuant to Rule 25-22.060, Florida Administrative Code, the Citizens of the State of Florida, through the Office of Public Counsel, Florida Retail Federation, Florida Industrial Power Users Group, AARP, and Attorney General Office (Interveners), request the Commission reconsider certain aspects of the decision memorialized in Order No. PSC-09-0283-FOF-EI, issued on April 30, 2009, and issue a revised order denying the step increase initially approved by the Commission. Order No. PSC-09-0283-FOF-EI memorialized the Commission's decision to approve a step increase in 2010 for the pro forma adjustment amounts for Tampa Electric Company's ("Tampa Electric's" or "Company's") five new, simple cycle combustion turbine electric generating units ("CTs") and the planned Big Bend Rail Facility.

As explained below, the Commission should reconsider several points of fact and law regarding the approval of the step increase treatment for the CTs and the Big Bend Rail Facility. First, the due process rights of the Citizens of the State of Florida, and of all parties representing consumer interests in this case, have been violated through the introduction and adoption of the step increase treatment by the Commission without notice and without any opportunity to litigate the substance of the issue. Second, consumers have been deprived of any point of entry to litigate the implementation of the step increase pursuant to criteria articulated in the Commission

Order. Third, the Commission overlooked the applicable statutes and its own rules in approving the step increase.

Standard of Review

The standard of review for a motion for reconsideration requires that the motion identify a point of fact or law which was overlooked or which the Commission failed to consider in rendering its order. Stewart Bonded Warehouse, Inc. v. Bevis, 294 So. 2d 315 (Fla. 1974); Diamond Cab Co. v. King, 146 So. 2d 889 (Fla. 1962); Pingree v. Quaintance, 394 So. 2d 161 (Fla. 1st DCA 1981). While a motion for reconsideration should not reargue matters that have already been considered, Sherwood v. State, 111 So. 2d 96(Fla. 3d DCA 1959) (citing State ex. rel. Jaytex Realty Co. v. Green, 105 So. 2d 817 (Fla 1st DCA 1958), it is appropriate for the Commission to consider points of fact and law that could not be raised.

Summary of the Arguments

The Commission should reject the step increase because: (1) granting the step increase, where no notice had been given in advance of the Agenda Conference that a step increase was even being considered and had not been requested by Tampa Electric, is a departure from the essential requirements of law and violates the parties' due process rights; (2) the proposed implementation of the step increase, which allows for the Commission staff to approve the increase upon the staff's determination that the criteria set forth in the Order have been met, violates the fundamental requirement of the Florida Administrative Procedures Act that parties must have a point of entry and opportunity for a hearing for any decision affecting their substantial interests; (3) the Commission's Order does not reflect the vote sheet from the Agenda Conference; (4) it is not allowed by the applicable statutes; and (5) it is not allowed by the Commission's rules. Moreover, even if the step increase were on procedurally firm ground, as the Commission has proposed to approve it, the step increase would result in a substantive

mismatch between the Company's costs and the Company's sales in the future period (2010) in which the increased rates are to be in effect. In further support of their Motion for Reconsideration, the Citizens of the State of Florida and the other Consumer Interveners state as follows:

Background

Tampa Electric requested a base rate increase of $228.2 million. As part of its requested base rate increase, the Company included in its projected test year the cost for five new simple cycle CTs and the Big Bend Rail Facility. The Company proposed to annualize the costs of the new CTs that it alleged were scheduled to go into service in May 2009 (two CTs) and in September 2009 (three CTs). TR 2009. The Company also proposed to annualize the Big Bend Rail Facility that was scheduled to go into service no earlier than December 2009. As specifically set forth in the Commission's Prehearing Order No. PSC-09-0033-PCO-EI, the specific issues regarding the costs of the 5 CTs and the Big Bend Rail Facility that was presented to the Commission and litigated by the parties were:

Issue 5: Is the pro forma adjustment related to the annualization of five simple cycle combustion turbine units to be placed in service in 2009 appropriate?

Issue 7: Is the pro forma adjustment related to the annualization of the Big Bend Rail Project to be placed into service in December 2009 appropriate?

The Company's position was that there should be "pro forma adjustments" that would apply for all of 2009 treating the CTs and the Rail Facility as if they had been used and useful from January 1, 2009, even though that is not the case. Commission staff recommended denying this annualized treatment for the five CTs and the Rail Facility, and instead recommended providing revenue requirements for the portion of the year Tampa Electric projected it would incur actual

costs in 2009. Recommendation pp. 11-14, 17-19. Essentially, the Commission's step increase gives the Company the DIFFERENCE (up to a maximum of $28.3M for the CTs and $4.6M for Rail Facility) between the Staff's recommendation and the full, annualized revenue requirements, effective in January 2010, which make up the "pro forma adjustments."

Based on the litigated issues, testimony was elicited from Tampa Electric's President, witness Black, admitting that Tampa Electric was in the process of re-evaluating the need to place into service the three CTs scheduled for service in September 2009. TR 107. Witness Black admitted that depending on what Tampa Electric's next demand and energy forecast indicated, installation of the three September CTs might be pushed out to a later date. TR 107. As the record reflects, since only three of the older CT units had been scheduled for retirement, it was possible that the September 2009 units would not come into service at all during the test year. Order No. PSC-09-0283-FOF-EI at 5. Although there was no dispute at hearing that some of units might not come on-line in 2009, the Commission in its Order relied on information produced after the hearing whereby the Company stated that all five CTs would be placed in service during 2009 - not testimony or exhibit evidence that any party had an opportunity to test. Id.

Based upon the fact that several of the CTs might not be coming into service during the test year, Commission staff recommended that Tampa Electric's pro forma adjustments to annualize the 5 simple CTs as if they went in service on January 1, 2009, would violate the principle of matching revenue, expenses, and rate base for a projected test year. The Commission staff recommended eliminating the pro forma adjustments for all 5 CTs. Recommendation at pp. 12-13. Further, Commission staff recommended the elimination of the Company's pro forma adjustment for the Big Bend Rail Project. Recommendation at 19.

The first time that the Citizens and the other Consumer Parties became aware that the Commission would even **consider** granting Tampa Electric an additional step increase in its base rates for 2010 for the five CTs and Big Bend Rail Facility was on March 17, 2009, the day the Commission met in Agenda Conference to decide the issues that had been litigated at the hearing and addressed in the parties' briefs. The Order resulting from that Agenda Conference states the following:

> To avoid a significant cost to the consumers and significant length of time to conduct a limited proceeding, we have decided to grant TECO a step increase in rates, effective January 1, 2010, for the cost of the five CT units. We authorize an increase in base rates to a maximum of $28.3 million for the five CTs in a manner consistent with the cost allocation methodology we have approved in this Order with the condition that these investments are completed and in commercial operation by December 31, 2009. In the event one or more of these projects are not completed by December 31, 2009, TECO shall submit a revision of the revenue requirement impact for these projects. This step increase is based upon the condition that the units must be needed for load generation.
>
> The decision to complete any or all of these projects by year end, considering changed circumstances such as, but not limited to, decreased electricity consumption, shall be subject to our staff's review and approval. There is testimony in the record that TECO may not stay on schedule with some of CTs because of the downturn in the economy. TECO shall only move forward with the units if the capacity is needed. This condition will help ensure that TECO will only move forward with its plans for the CTs if it is justified in terms of load requirements.
>
> Therefore, based on the discussion above, we grant TECO a step increase in rates, effective January 1, 2010, for the cost of the five CT units, provided that the conditions as stated above are met.
>
> To avoid significant cost to the consumer and significant length of time to conduct a limited proceeding, we have decided to grant TECO a step increase in rates, effective January 1, 2010, for the cost of the rail facilities for unloading coal at Big Bend Power Station, provided that the rail facilities are placed in commercial service by December 31, 2009. We authorize an increase in base rates a maximum of $4.6 million for the rail facilities for unloading coal at Big Bend Power Station in a manner consistent with the cost allocation methodology we have approved in this Order, with the condition that this investment is completed and in commercial operation by December 31, 2009. The maximum amount is subject to change depending on our decisions regarding other issues. In

the event that this project is not complete be December 31, 2009, TECO shall submit a revision of the revenue requirement impact for this project.

Order No. PSC 09-0283-FOF-EI at p. 6 and 9.

Basis for Reconsideration

1. ***Departure from the Essential Requirements of Law - Parties Were Given No Notice, and No Opportunity, to Litigate the Step Increase Issue.***

The Consumer Parties did not know that a step increase was at issue or that the Commission was going to consider such treatment. The proposed step increase treatment: (1) was not requested by the Company in its Petition; (2) was not requested by any of the Company's witnesses in direct testimony or on cross-examination; (3) was not raised verbally or in writing as an issue in the Company's prehearing statement or at any other point in the pre-hearing process; and (4) was not even added as an issue after hearing; therefore, it was not addressed by the parties in post-hearing briefs. None of the Consumer Parties addressed the issue of the step increase in their testimony BECAUSE THEY DID NOT KNOW THAT IT WAS AT ISSUE OR THAT THE COMMISSION WAS GOING TO CONSIDER SUCH TREATMENT. Moreover, the manner in which the step increase was approved does not provide for any point of entry into the process for the interveners to protect the their substantial rights in the Commission staff's future review and rate adjustment based upon the Company's compliance with step increase conditions. Further, it unduly delegates authority to Commission staff to set rates upon their review and approval of Tampa Electric's compliance with the step increase conditions.

a. Violation of Parties Due Process Rights

The step increase treatment was not proposed or requested by the Company as part of its petition, direct testimony, rebuttal testimony, Minimum Filing Requirements, or included

anywhere else in the record. The step increase was not raised as an issue in the case by the Company or by any other party, nor was it presented in any direct testimony by the Company - other than a passing comment by one Company witness during cross-examination by a Commissioner.

Fundamental fairness of due process requires that parties to a proceeding be given adequate notice and an opportunity to be heard on this issue. Bresch v. Henderson, 761 So. 2d 449, 451 (2nd DCA 2000) (No notice prior to hearing was given that the party was facing an allegation of civil contempt. A person subject to civil contempt sanctions is entitled to a proceeding that meets the fundamental fairness requirement of the due process clause of the Fourteenth Amendment to the United States Constitution.) Failure to provide any notice whatsoever constituted a lack of due process which would require the court's order to be vacated even if it had included the required findings. Id. at 451. Since the step increase was not proposed by the Company and was only presented the day of the Commission's vote on the issues after the post-hearing briefs of the parties were filed, the Commission not only failed to consider the due process implications of voting to approve the step increase, it failed to comply with the fundamental fairness required by due process. The Commission's own Order Establishing Procedure required that all issues, unless for good cause shown, must be raised no later than the Prehearing. Order No. PSC-08-0557-PCO-EI, at 5, as modified by Order No. 08-0635-PCO-EI. Tampa Electric did not raise, as part of its pleadings, testimony, or prehearing or post hearing statements, the issue of whether the five CTs and Big Bend Rail Facility should be subject to a step increase. The only issue before the Commission was whether the proposed annualized treatment by the Company should be approved.

Since the pro forma adjustments quantifying the annualization violated the principle of matching revenue, expenses and rate base for the projected test year, Commission staff recommended denying these annualized pro forma adjustments. Recommendation at pp. 12 and 19. Furthermore, the Commission acknowledged that under normal circumstances the pro forma adjustment for the five CTs would have been eliminated from the test year because they violated that matching principle. Order No. PSC-09-0283-FOF-EI at p. 6. But for the introduction of the step increase, the Commission's vote on the issue as presented would have eliminated any pro forma adjustments.

The lack of notice, and the surprise consideration of the step increase issue on the day of the Commission's vote, without notice to the Citizens or any of the Consumer Parties, and without any opportunity for the Citizens or other Consumer Parties to litigate the issue, is a departure from the essential requirements of law and a violation of the parties' due process rights. The Commission should grant reconsideration and rescind its approval of the step increase. Based upon what future events transpire, Tampa Electric has the ability to file a petition for a limited proceeding asking for this relief with a fair opportunity for all parties to litigate it.

b. Violation of Chapter 120, Florida Statutes

Chapter 120, Florida Statutes, provides that before any agency may implement a decision that affects the substantial interests of any person, the agency must provide a point of entry giving any substantially affected persons the opportunity to request and have a hearing on the merits of any disputed issues of material fact. Here, the Commission has allowed its staff to approve the step increase upon the staff's determination that the criteria articulated in the Order, including whether the CTs are needed for service in 2009 or 2010, have been met. The Citizens of the State of Florida and the other Consumer Interveners believe and dispute any suggestion

that the three September CTs are needed however, the Commission's proposed step increase, implemented per the Commission's Order, would deny the Citizens and the other Consumer Parties any point of entry to litigate that issue. Moreover, the point of entry must be timely; it is not appropriate, reasonable, or fair to allow the Company to proceed to build its CTs, and then leave the Consumers to litigate the issue of whether they were needed after the units are built. This is further evidence of the procedural defects in the Commission's proposed approval of the step increase.

c. The Commission's Order Does Not Reflect the Commission's Vote

The Commission voted to approve the recommendation made in Handout 3 provided at the Agenda Conference. This handout was not an exhibit at hearing and had never been seen by any of the Consumer Parties prior to the Agenda Conference, where they were not permitted to participate.

In that handout, the Commission voted for the following language "[t]he decision to complete any or all of these projects by year end, considering changed circumstances such as, but not limited to, decrease electricity consumption, is subject to **Commission review and rate adjustment**." In the Order the language in bold was changed to ". . .shall be subject to **our staff's review and approval**." While this is a subtle change in the wording, it creates a significant change in the meaning and implementation of the step increase review. Under the original language, the substantial decision making remained with the Commission subject to a further vote. However, the change in the language - that was not voted on or discussed - places the substantial decision making on final rates with Commission staff. Thus, the Order's language not only fails to reflect the actual vote that was made, but it arguably creates an unlawful delegation of the Commission's authority to make substantial decisions to staff.

2. *Violation of Statutes and Commission Rules*

a. Violation of Used and Useful Requirement

The step increase approved by the Commission will allow the Company to recover the projected annualized pro forma adjusted costs of the CTs and Big Bend Rail Facility effective January 1, 2010. These pro forma adjustments are based upon the projected costs for the portion of 2009 when these projects were not used and useful in the public service. See, Section 366.06(1), Florida Statutes. For the two May 2009 CTs, the pro forma adjustment covered the period January 2009 through April 2009 (prior to these units being placed into public service in the test year). For the September 2009 CTs, the pro forma adjustment covered the period January 2009 through August 2009 (prior to these units being placed into public service in the test year). For the December 2009 Big Bend Rail Facility, the Company's requested pro forma adjustment covered the period January 2009 through November 2009 (prior to this facility being placed into public service in the test year).

Pursuant to Section 366.06(1), Florida Statutes, the Commission shall use the actual legitimate costs of the utility's property ". . . actually used and useful in the public service . . ." for ratemaking purposes. The Webster New Collegiate Dictionary defines "actual" as: a. "existing in act and not merely potentially"; b. "existing in fact or reality"; c. "not false or apparent". The Webster New Collegiate Dictionary defines "actually" as "at the present moment."

The Commission's ratemaking statutes clearly set forth the parameters for costs that the Commission can include for ratemaking purposes. Those costs cannot be speculative in nature and must exist at the time of the ratemaking. The fact that the step increase treatment approved by the Commission provides for additional Commission staff review and adjustment based upon

potentially changing circumstances underlines the speculative nature of the CT and Big Bend Facility costs.

Section 366.076(2), Florida Statutes, provides that the Commission may adopt rules for the determination of rates in full revenue requirement proceedings which rules provide for adjustments of rates based upon revenues and costs during the period new rates are to be in effect and for incremental adjustments in rates for subsequent periods. Although a subsequent adjustment is statutorily permissible, such subsequent adjustments are subject to the same requirement that these costs must be based upon actual costs used and useful in the public service. The speculative nature of the costs for these CTs, even as of December 31, 2009, violates the statutory requirement that the costs must be actual as well as used and useful.

b. Violation of Requirements Governing Conduct of Rate Cases

Section 366.06, Florida Statutes, further provides that "[a]ll applications for changes in rates shall be made to the commission in writing under rules and regulations prescribed, . . ." As part of this section, the commencement date for the base rate case is determined by the Commission or its designee when the utility has filed with the clerk the minimum filing requirements as established by rule of the Commission. See 366.06(3), Florida Statutes. Thus, the Commission is required by statute to set up rules for the conduct of rate case proceedings and must follow its own rules.

The minimum filing requirements are defined in Rule 25-6.043, Florida Administrative Code. Rule 25-6.043(h), Florida Administrative Code, requires that "[u]nless a specific schedule requests otherwise, average is defined as the average of 13 monthly balances." Further, Rule 25-6.14 requires that a Company, prior to filing a petition, give 60 day notice regarding whether it will use a historical or projected test year. Rule 25-6.14(2) further clarifies that in the

event a test year other than one based on a calendar year or the company's normal fiscal year is selected, the notification shall include an explanation of why the chosen test year period is more appropriate.

It is clear from the Commission's rules that the costs to be considered in a rate case must be based upon a single year using an average of 13 monthly balances. In its test-year notification letter, Tampa Electric chose to use a projected test-year ending December 31, 2009, based upon a historic base year ended December 31, 2007. The projected test-year utilized the average 13 monthly balances for the projected 2009 test-year in accordance with the requirements of the Commission's rules. However, in contravention of the rules and without any request for variance from the rules, the step increase attempts to use a year-end balance as of December 31, 2009. By including the pro forma adjustment amounts for the CTs and Big Bend Rail Facilities which would otherwise have been zero balances for the months not in service, the step increase fails to comply with the Commission's rules that require using an average of the 13 monthly balances.

Moreover, the step increase selectively applies a year-end test balance for only these **three** plant accounts (the balance of the plant account on December 31, 2009) while applying the rule's 13 monthly average balances for all other plant accounts. This violates the rule. Further, this variation from required procedure was unfair as it was unnoticed.

In addition, while the statute regarding a limited proceeding under section 366.076(2) provides that "[t]he commission may adopt rules . . . which rules provide for adjustments of rates based on revenues and costs during the period new rates are to be in effect . . . ," the Commission never promulgated meaningful rules to implement this section of the statute. Rule 25-6.0425, Florida Administrative Code, merely restates the language of the statute and provides no

guidance as to how this statutory provision would be implemented. Since there are no meaningful rules that have been promulgated by the Commission to allow for such subsequent adjustment under a "limited proceeding," the step increase would create a facial violation of section 120.54, Florida Statutes, by implementing a statute that has been on the books since at least 1991, without the promulgation of the rules contemplated by the statute which would ensure the fairness of the process.

3. The Proposed Step Increase Would Result in a Substantive Mismatch of Revenues and Sales

It is fundamental that when a utility's rates are set, those rates must be calculated on the basis of the allowed revenues and the utility's sales for the period for which the rates are to be in effect. Thus, for 2009, the Commission properly considered what it deemed to be the Company's appropriate revenue requirements for 2009 and then divided those revenues by applicable sales ("billing determinants" in regulatory terminology) to arrive at the rates that became effective in May 2009. For 2010, the proper analysis and calculations would be to divide the allowed 2010 revenues BY TAMPA ELECTRIC'S PROJECTED SALES FOR 2010. HOWEVER, THE COMMISSION HAS PROPOSED TO ALLOW TAMPA ELECTRIC TO RAISE ITS RATES IN JANUARY 2010 BASED UPON THE COMPANY'S 2009 SALES. This is fundamentally wrong as a matter of regulatory practice. If not corrected, the resulting rates will be unfair, unjust, and unreasonable because they will have been calculated for a projected year using that projected year's revenue requirements divided by a previous year's sales.

Conclusion

Wherefore, the Commission should reconsider its decision to implement a step increase for the five CTs and Big Bend Rail Facilities. The Commission should strike the portions of the Order implementing the step increase.

Dated this 15th day of May, 2009

Respectfully submitted,

Patricia A. Christensen
Associate Public Counsel
Office of Public Counsel
c/o The Florida Legislature
111 West Madison Street, Room 812
Tallahassee, FL 32399-1400

ATTORNEY FOR THE CITIZENS
OF THE STATE OF FLORIDA

Cecilia Bradley
Senior Assistant Attorney General
Office of the Attorney General
The Capitol-PL01
Tallahassee, FL 32399-1050

ATTORNEY FOR THE OFFICE
OF THE ATTORNEY GENERAL

Vicki Gordon Kaufman
Jon C. Moyle Jr.
Keefe Anchors Gordon & Moyle, PA
118 North Gadsden Street
Tallahassee, FL 32301

ATTORNEYS FOR FLORIDA
INDUSTRIAL POWER USERS GROUP

Robert Scheffel Wright
John T. LaVia
Young Law Firm
225 South Adams Street, Ste 200
Tallahassee, FL 32301

ATTORNEYS FOR FLORIDA
RETAIL FEDERATION

Mike Twomey
AARP
P.O. Box 5256
Tallahassee, FL 32314-5256

ATTORNEY FOR AARP

CERTIFICATE OF SERVICE
DOCKET NO. 080317-EI

I HEREBY CERTIFY that a true and correct copy of the foregoing Interveners' Motion for Reconsideration to Tampa Electric Company has been furnished by electronic mail and U.S. Mail to the following parties on this 15th day of May, 2009.

James Beasley/Lee Willis
Ausley Law Firm
P.O. Box 391
Tallahassee, FL 32302

Jean Hartman/Jennifer Brubaker
Keino Young/ Martha Brown
Florida Public Service Commission
2540 Shumard Oak Boulevard
Tallahassee, Florida 32399-0850

Vicki Kaufman/Jon Moyle
Florida Industrial Power Users Group
Anchors Law Firm
118 N. Gadsden Street
Tallahassee, FL 32301

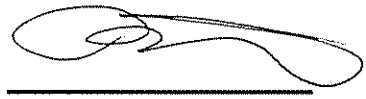
R. Scheffel Wright
Young Law Firm
225 S. Adams Street, Ste. 200
Tallahassee, FL 32308

Paula K. Brown
Tampa Electric Company
P.O. Box 111
Tampa, FL 33602

Michael B. Twomey
P.O. Box 5256
Tallahassee, FL 32314-5256

Cecilia Bradley
Office of the Attorney General
The Capitol – PL 01
Tallahassee, FL 32399-1050

John W. McWhirter, Jr.
McWhirter, Reeves & Davidson, P.A.
P.O. Box 3350
Tampa, FL 33601-3350



Patricia A. Christensen
Associate Public Counsel